TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted] 1916

No. [redacted]251

FRED A. PERLEY AND W. H. CROCKETT, PLAINTIFFS IN ERROR,

vs.

THE STATE OF NORTH CAROLINA.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NORTH CAROLINA.

FILED AUGUST 28, 1917.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1917.

No. 634.

FRED A. PERLEY AND W. H. CROCKETT, PLAINTIFFS IN ERROR,

vs.

THE STATE OF NORTH CAROLINA.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NORTH CAROLINA.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., AUGUST 22, 1917.

1 Supreme Court of the United States.

No. —.

FRED A. PERLEY and W. H. CROCKETT, Plaintiffs in Error,

v.

STATE OF NORTH CAROLINA, Defendant in Error.

Petition for Writ of Error.

To the Honorable Chief Justice of the State of North Carolina:

The Petitioners, Fred A. Perley and W. H. Crockett, respectfully show, that at the April Term, 1917 of the Superior Court of the County of Buncombe, State of North Carolina, a Court of general jurisdiction, a judgment was rendered against said petitioners in a certain cause therein pending, wherein the State of North Carolina, was plaintiff, and your petitioners, were defendants, adjudging that the defendants, and each of them, were guilty of a crime, or misdemeanor, and that the defendants, each pay a fine of Three Hundred ($300.00) Dollars, and one-half of the costs of said cause.

That thereupon your petitioners appealed from said judgment to the Supreme Court of the State of North Carolina, and that the said Supreme Court of the State of North Carolina, at its Spring Term, 1917, to-wit: on the 23rd day of May, 1917 rendered a final judgment in said cause affirming the said judgment of the Superior Court of the State of North Carolina, as will appear by reference to the record and proceedings in said cause; that the said Supreme Court of the State of North Carolina is the highest court of said state in which a de-
2 cision in said action can be had; and your petitioners claim the right to remove said cause to the Supreme Court of the United States by writ of error, under and by virtue of Section 709 of the Revised Statutes of the United States and the other statutes of said United States, because, as your petitioners claim, their defense to the alleged cause of action of the defendant in error, arises under the Constitution and laws of the United States, to-wit: the Fourteenth Amendment of the Constitution of the United States, and the other provisions of the Constitution of the United States, and the amendments thereto; and further that the rights and privileges set up and claimed by your petitioners under the statutes of the United States and under the Constitution of the United States, and particularly under the Fourteenth Amendment of the Constitution of the United States, were denied by the said Superior Court of the State of North Carolina, and by the Supreme Court of the State of North Caroiina, and your petitioners were denied the equal protection of the laws and were deprived of their property without due process of law, contrary to the Constitution of the United States and the Fourteenth Amend-

ment thereof, as appears by the record of the proceedings in said cause which is herewith submitted, and that the decision of the said Supreme Court of North Carolina denied to your petitioners the construction of the Constitution of the United States, to which they were entitled in said cause, and the errors complained of on this petition are more fully set forth in the assignments of error, hereto attached.

Wherefore your petitioners, Fred A. Perley and W. H. Crockett, pray the allowance of a writ of error, returnable to the Su-
3 preme Court of the United States within Thirty Days, as prescribed by the rules of practice in the Supreme Court of the United States, and for a citation and supersedeas as provided by law; and your petitioners will ever pray, etc.

MARTIN, ROLLINS & WRIGHT,
Counsel for Petitioners.

Let the writ of error issue as prayed for. This 16th day of July, 1917.

WALTER CLARK,
Chief Justice of the Supreme Court of North Carolina.

4 [Endorsed:] Supreme Court of the United States. Fred A. Perley and W. H. Crockett, Plaintiffs in error, v. State of North Carolina, defendant in error. Petition for Writ of Error. Filed Jul- 19, 1917. In Supreme Court, North Carolina. Martin, Rollins & Wright, Attorneys and Counsellors at Law, Asheville, N. C.

5 Supreme Court of the United States, October Term, 1917.

No —.

FRED A. PERLEY and W. H. CROCKETT, Plaintiffs in Error,

v.

STATE OF NORTH CAROLINA, Defendants in Error.

Assignments of Error.

Now come the above named plaintiffs in error, Fred A. Perley and W. H. Crockett, and file herewith their petition for writ of error and say, that there are errors in the record and proceedings of the above entitled case, and for the purpose of having the same reviewed in the Supreme Court of the United States, make the following assignments of error:

The Supreme Court of North Carolina erred in its construction of the Fourteenth Amendment of the Constitution of the United States.

That by this error the Supreme Court of North Carolina, decided against the rights set up and claimed by your petitioners under said Fourteenth Amendment to the Constitution of the United States and under other provisions of said Constitution.

The said errors are more particularly set forth as follows:

I.

For that the Court erred in refusing to grant the motion of the plaintiffs in error to quash the bill of indictment in this case, "Because the statute of the State of North Carolina under which said bill of indictment purports to have been found and returned, to-wit: Chapter 56 of the Public laws of North Carolina, passed
6 by the General Assembly at its regular session in the year 1913, is unconstitutional and void, in that the same if enforced against these plaintiffs in error would abridge the privileges and immunities of the plaintiffs in error, citizens of the United States, and would deprive the said plaintiffs in error of their property without due process of law, and would deny to the plaintiffs in error the equal protection of the laws, contrary to the Constitution of the United States, and especially to the Fourteenth Amendment thereof, which constitutional protection and immunities are hereby specially set up and claimed on behalf of the plaintiffs in error."

II.

For that the Court erred in refusing to grant the motion of the plaintiffs in error to quash the bill of indictment in this cause "Because said statute of the State of North Carolina, to-wit: Chapter 56 of the Public Laws of 1913, ratified the 6th day of March, 1913, is unconstitutional and void, in that the same does not bear equally upon all persons similarly situated; is arbitrary and unreasonable, and if enforced would deprive said plaintiffs in error of their property without due process of law, contrary to the Constitution of the United States, and contrary to the Fourteenth Amendment thereof, the protection of which the said plaintiffs in error hereby specially plead and invoke."

III.

For that the court erred in holding and adjudging the plaintiffs in error guilty upon the special verdict as appears in the record "Because the statute of the State of North Carolina, under which said bill of indictment purports to have been found and returned, to-wit: Chapter 56 of the Public Laws of North Carolina, passed by
7 the General Assembly at its regular session in the year 1913, and ratified on the 6th day of March 1913, is unconstitutional and void, in that the same if enforced against the plaintiffs in error, would abridge the privileges and immunities of the plaintiffs in error, citizens of the United States, and would deprive the said plaintiffs in error, of their property without due process of law, and would deny to the plaintiffs in error the equal protection of the laws, contrary to the Constitution of the United States, and especially to the Fourteenth Amendment thereof, which constitutional protection and immunities are hereby specially set up and claimed on behalf of said plaintiffs in error.

IV.

Because said statute of the State of North Carolina, to-wit: Chapter 56 of the Public Laws of 1913, ratified the 6th day of March, 1913, is unconstitutional and void, in that the same does not bear equally upon all persons similarly situated; is arbitrary and unreasonable, and if enforced would deprive said plaintiffs in error of their property without due process of law, and deny to them the equal protection of the law, contrary to the Fourteenth Amendment thereof, the protection of which the said plaintiffs in error hereby specially plead and invoke.

MARTIN, ROLLINS & WRIGHT,
Counsel for Plaintiffs in Error.

8 [Endorsed:] Supreme Court of the United States, October Term, 1917. No. —. Fred A. Perley and W. H. Crockett, Plaintiffs in error, v. State of North Carolina, defendant in error. Assignments of Error.

Filed Jul- 19, 1917. In Supreme Court, North Carolina.

Martin, Rollins & Wright, Attorneys and Counsellors at Law, Asheville, N. C.

9 *Writ of Error.*

UNITED STATES OF AMERICA:

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of North Carolina, Greeting:

Because in the record and proceedings as also in the rendition of the judgment of a plea which is in the said Supreme Court, before you, or some of you, being the highest court of law or equity of the said state in which a decision could be had in said action between the State of North Carolina, plaintiff, and Fred A. Perley and W. H. Crockett, defendants, wherein was drawn in question the validity of a treaty or statute, of, or an authority exercised under the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State of North Carolina, on the ground of their being repugnant to the Constitution, treaties or laws of the United States, and the decision was in favor of their validity; or wherein was drawn in question the construction of a clause of the constitution or treaty or statute of or commission held under the United States, and the decision was against the title, right, privilege or exemption specially set up or claimed under such clause of the said constitution, treaty, statute or commission; a manifest error hath happened to the great damage of the said defendants, Fred
10 A. Perley and W. H. Crockett, as by their complaint appears. We being willing that error, if any hath been, should

be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States, should be done.

Witness, the Honorable Edward D. White, Chief Justice of the United States on the 16 day of July, in the year of our Lord, One thousand nine hundred and seventeen.

[Seal United States District Court, Eastern Dist. of N. C., at Raleigh.]

LEO V. HEARTT,
Clerk of the District Court of the United States for the Eastern District of North Carolina.

Fee 25¢, paid.
L. V. H., *Com.*

The foregoing writ of error, is hereby allowed.
This the 16 day of July, 1917.

WALTER CLARK,
Chief Justice of the Supreme Court of North Carolina.

11 [Endorsed:] United States of America. Fred A. Perley & W. H. Crockett, Plaintiffs in error, v. State of North Carolina. Writ of error.
Filed Jul. 19, 1917. In the Supreme Court, North Carolina.
Martin, Rollins & Wright, Attorneys and Counsellors at Law, Asheville, N. C.

12 *Citation.*

UNITED STATES OF AMERICA:

To the State of North Carolina, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States at Washington within thirty days from the date hereof, pursuant to a writ of error filed in the office of the Supreme Court of the State of North Carolina, wherein Fred A. Perley and W. H. Crockett, are plaintiffs in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error, as in the said

writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in this behalf.

Witness the Honorable Walter Clark, Chief Justice of the Supreme Court of North Carolina, this the 16th day of July, 1917.

WALTER CLARK,
Chief Justice.

Attest:

[Seal of the Supreme Court of the State of North Carolina.]

J. L. SEAWELL,
Clerk Supreme Court of North Carolina.

We, the undersigned, Attorney-General of the State of North Carolina, attorney for the defendant in error, in the above entitled cause, hereby acknowledge service of the above citation by the receipt of a copy thereof, and waive any further service thereof.

This the 16 day of July, A. D., 1917.

JAMES S. MANNING,
Attorneys for Defendant in Error,
The State of North Carolina.

13 [Endorsed:] United States of America. Fred A. Perley and W. H. Crockett, Plaintiffs in error, v. State of North Carolina. Citation.

Filed Jul. 19, 1917. In Supreme Court, North Carolina.

Martin, Rollins & Wright, Attorneys and Counsellors at Law, Asheville, N. C.

14 In the Supreme Court of North Carolina.

FRED A. PERLEY and W. H. CROCKETT

v.

STATE OF NORTH CAROLINA.

Supersedeas and Cost Bond.

Know all men by these presents, that we, Fred A. Perley and W. H. Crockett, as principals, and C. A. Dickey, as surety, are held and firmly bound unto the State of North Carolina, in the full sum of five hundred ($500.00) dollars, for the payment of which sum, well and truly to be made, we hereby jointly and severally bind ourselves, our successors and assigns firmly by these presents.

Sealed with our seals and dated this the 5th day of July, 1917.

Whereas, lately at a hearing had before the Supreme Court of North Carolina, in an action pending in said Court between the State of North Carolina, as plaintiff, and the said Fred A. Perley and W. H. Crockett, as defendants, a final judgment was rendered against the said Fred A. Perley and W. H. Crockett; and

Whereas, the said Fred A. Perley and W. H. Crockett seek to prosecute a writ of error to the Supreme Court of the United States to reverse said judgment.

Now, therefore, the condition of this obligation is such that if the said Fred A. Perley and W. H. Crockett, as plaintiffs in error, shall prosecute their writ of error, and answer all costs that may
15 be adjudged against them, if they shall fail to make good their plea, then this obligation shall be void, otherwise, to remain in full force and effect.

In witness whereof, the said principals and surety have hereunto caused their names to be subscribed, and affixed their seals, this the 5th day of July, 1917.

FRED A. PERLEY, [SEAL.]
By J. C. M.
W. H. CROCKETT, [SEAL.]
By J. C. M.
C. A. DICKEY. [SEAL.]

NORTH CAROLINA,
Buncombe County:

C. A. Dickey, being duly sworn, says: That he is the surety in the above mentioned supersedeas and cost bond; that he is a resident of the State of North Carolina; that he is worth double the amount of the foregoing bond, over and above all of his debts and liabilities and property exempt from execution.

C. A. DICKEY.

Sworn to and subscribed before me, this the 5th day of July, A. D., 1917.

[SEAL.] ELMER D. LANSING,
Notary Public, Buncombe County, N. C.

My commission expires June 15th, 1918.

The foregoing bond having been examined, the same is hereby approved, and it is ordered that the same be accepted, and that it shall operate as a supersedeas in the above entitled cause.

This the 16 day of July, 1917.

[SEAL.] WALTER CLARK,
Chief Justice of the Supreme Court of North Carolina.

16 [Endorsed:] State of North Carolina. In the Supreme Court. Fred A. Perley and W. H. Crockett v. State of North Carolina. Supersedeas and Cost Bond.

Filed Jul. 19, 1917. In Supreme Court, North Carolina.

Martin, Rollins & Wright, Attorneys and Counsellors at Law, Asheville, N. C.

17 Be it remembered, that a regular term of the Superior Court for the County of Buncombe for the trial of criminal and civil cases was opened and held in the court house in the City of Asheville on the 3rd Monday after the 1st Monday in September, the same being Monday, Sept. 25th, 1916:

Present, presiding and holding said Court, according to law, Hon. W. J. Adams, Judge of the 13th Judicial District:

Present and prosecuting on behalf of the State, J. E. Swain, Solicitor for the 19th Judicial District:

E. M. Mitchell, Sheriff of Buncombe County, returned into Court the following venire of good and lawful men, duly drawn and summoned to serve as jurors for the first week of this term: R. E. Robinson and 37 others.

From the foregoing venire, the following were drawn to serve as the Grand Jury for this term: R. C. Crowell, foreman, and seventeen others, the oath was duly administered to them and the following business was transacted:

The Grand Jury, by their foreman, returned into Court the following bill of indictment as a true bill:

Indictment.

STATE OF NORTH CAROLINA,
Buncombe County:

Superior Court, September Term, A. D. 1916.

The jurors for the State, upon their oath, present, that Fred A. Perley and W. H. Crockett, late of the County of Buncombe, on the 1st day of July, in the year of our Lord one thousand nine hundred and sixteen, with force and arms, at and in the

18 county aforesaid, — unlawfully and wilfully violate the provisions of Chapter 56, of the public laws of North Carolina, ratified the 6th day of March, 1913; the said Fred A. Perley and W. H. Crockett being then and there the owners of standing timber on lands within four hundred feet of the Asheville water shed property, on the waters of the North Fork of the Swannanoa River, in Buncombe County, N. C., said watershed property being then and there owned and used by the City of Asheville for the purpose of furnishing said city with a water supply; and said defendants did then and there cut and remove the timber on and along the ridge crest, or top of the mountain range leading from Balsam Gap, a point in the line between Yancey County and Buncombe County, leading up and along said ridge and said line between said counties, in an easterly direction, to a point near the top of Potato Knob, said cutting and removing of timber being within four hundred feet of said Asheville watershed property, said cutting having been done and said removal had more than three months prior to this indictment, and after due notice in writing given to said defendants commanding and warning them to remove or cause to be burned all tree tops, boughs and laps and other portions of timber not desired to be taken for commercial purposes within

four hundred feet of the boundary line of said part of said watershed so held by said city; did then and there fail, refuse and neglect to remove, or cause to be burned all tree tops, boughs and laps and other portions of timber not desired to be taken for commercial purposes or other purposes, within four hundred feet of the boundary line of said watershed so as to leave a space of four hundred feet immediately adjoining said boundary line of such watershed, free and clear of all such tree tops, laps, boughs and other inflammable material caused by or left from cutting such standing timber, so as to prevent the spread of fire from such cut over area and the consequent damage to said watershed. And by reason of said cutting and leaving upon said land said tree tops, laps and branches, the said watershed and property of said City of Asheville is greatly in danger of being destroyed by fire, contrary to the form of the Statute in such case made and provided, and against the peace and dignity of the State.

SWAIN, *Solicitor.*

Witnesses:
JAMES G. STIKELEATHER (x).
WILL BURNETT.
BART BURNETT.

Those marked (x) sworn by the undersigned foreman, and examined before the grand jury; and this bill found, a true bill.

R. C. CROWELL,
Foreman Grand Jury.

Motion to Quash.

STATE OF NORTH CAROLINA,
County of Buncombe:

In the Superior Court, April Term, 1917.

STATE

v.

FRED A. PERLEY and W. H. CROCKETT.

Now come the defendants in the above entitled cause, Fred A. Perley and W. H. Crockett, and move this Honorable Court to quash the bill of indictment heretofore found and returned in this cause for the following reasons:

1. Because the statute of the State of North Carolina, under which said bill of indictment purports to have been found and returned, to-wit: Chapter 56 of the Public Laws of North Carolina, passed by the General Assembly at its regular session in the year 1913, and ratified on the 6th day of March, 1913, is unconstitutional and void, in that the same if enforced against these defendants would abridge the privileges and immunities of the defendants, citizens of the United States, and would deprive

the said defendants of their property without due process of law, and would deny to the defendants the equal protections of the laws, contrary to the Constitution of the United States, and especially to the Fourteenth Amendment thereof, which constitutional protection and immunities are hereby specially set up and claimed on behalf of said defendants.

2. Because said statute of the State of North Carolina, to-wit: Chapter 56 of the Public Laws of 1913, ratified the 6th day of March, 1913, is unconstitutional and void, in that the same does not bear equally upon all persons similarly situated; is arbitrary and unreasonable, and if enforced would deprive said defendants of their property without due process of law, and deny to them the equal protection of the law, contrary to the Constitution of the United States, and contrary to the Fourteenth Amendment thereof, the protection of which the said defendants hereby specially plead and invoke.

MARTIN, ROLLINS & WRIGHT,
Counsel for Defendants.

Filed April 2, 1917.

J. H. CATHEY, *C. S. C.*,
By J. B. CAIN, *D. C.*

21 *Special Verdict.*

April Term, 1917.

STATE

vs.

FRED A. PERLEY and W. H. CROCKETT.

To try the issues herein joined comes the following jury of good and lawful men, to-wit: J. E. Brown and eleven others, who being duly impaneled, find the following verdict:

The jurors find that on the 1st day of July, in the year of our Lord one thousand nine hundred and sixteen, the City of Asheville, a municipal corporation, did own a certain large boundary of land, situated in the County of Buncombe, and State of North Carolina, which said boundary of land consists of about 16,000 acres, the outside boundary of which is about 12 miles in length; that on the 1st day of July, 1916, prior thereto and since that time, the said City of Asheville, held and used said property as a water shed, from which it derived water which was furnished to the inhabitants of the City of Asheville, North Carolina, for domestic and other purposes, which said property was known as the City Water Shed.

That the defendants, Fred A. Perley and W. H. Crockett, on or about the 1st day of July, 1916, were the owners of standing and fallen timber on certain lands situated in Yancey County, North

Carolina, which said lands lie within four hundred feet of said water shed belonging to the City of Asheville, and adjoining said water shed on the north about four miles, but did not own the land on which said timber stood and that water did not drain from said timber, or the land on which it stood, on to said water shed; that said water shed extends to the north to the top of ridges and
22 mountains on one side, and the timber owned by the defendants, which was cut as herein found, stood on land extending to the south which reached the tops of the ridges and mountains on the opposite side, and that said lands and timber were in all respects substantially similar on both sides of the line of said city water shed both within and without. That on or about the 1st day of July, 1916, the said defendants, Perley & Crockett, did cut and remove a portion of the timber owned by them, standing and growing on said lands, adjoining the said water shed, and within four hundred feet of the line of the lands of the City of Asheville, hereinbefore referred to, and that said cutting and removing of said timber was done more than three months prior to the bringing of this indictment; that after the cutting and removing of said timber by the said defendants, and before the bringing of this action, the said City of Asheville gave due notice in writing to the defendants, commanding and warning them to remove, or cause to be burned, all tree tops, boughs and laps, and other boughs and timber not desired to be taken for commercial purposes within 400 feet of the boundary line of said land so held by the City of Asheville; that after cutting and removing said timber from said lands, the said defendants had left on a portion of said lands and within four hundred feet of the line of the lands belonging to the City of Asheville, certain tree tops, boughs, laps and other portions of timber not desired to be taken for commercial purposes or other purposes; that within said three months, and after notice as aforesaid, the said defendants failed, refused and neglected to remove or cause to be burned, all tree tops, boughs and laps and other portions of timber not desired to be taken for commercial purposes, and within four hundred feet of the boundary line of the property of said City of Asheville, and did fail to leave a space of
23 four hundred feet immediately adjoining said boundary line of said City of Asheville, free and clear of all such tree tops, laps and boughs, caused or left from cutting such standing timber.

And if, on the foregoing facts, the Court is of the opinion that the defendants are guilty, as a matter of law, then the jurors so find them guilty; if, on the foreging facts, the court is of the opinion that the defendants are not guilty, as a matter of law, then the jurors find the defendants not guilty.

We agree to the foregoing as a special verdict in this case.

J. E. SWAIN, *Solicitor.*

MARTIN, ROLLINS & WRIGHT,
Attorneys for Defendants.

Defendants move in apt time to quash bill on written motion filed. Motion denied and defendants except and on the special verdict

agreed upon and signed by parties, the court adjudges that each of the defendants is guilty, to which each of defendants except.

Adjudged that each of these defendants pay a fine of $300 and one-half of the costs. Defendants move for new trial for errors assigned. Motion denied and defendants except. Judgment and defendants except and in open court appeal to Supreme Court. Notice waived. Appeal bond, $50.00. Appearance bond, $500.00.

21 *Exceptions and Assignments of Errors.*

STATE OF NORTH CAROLINA,
County of Buncombe:

In the Superior Court, April Term, 1917.

STATE

v.

FRED A. PERLEY and W. H. CROCKETT.

Now come the defendants, Fred A. Perley and W. H. Crockett, by and through their counsel, Martin, Rollins and Wright, and except and assign error in the above entitled cause as follows:

1. For that the court erred in refusing to grant the motion of the defendants to quash the bill of indictment in this cause "Because the statute of the State of North Carolina, under which said bill of indictment purports to have been found and returned, to-wit: Chapter 56 of the Public Laws of North Carolina, passed by the General Assembly at its regular session in the year 1913, and ratified on the 6th day of March, 1913, is unconstitutional and void, in that the same if enforced against these defendants, would abridge the privileges and immunities of the defendants, citizens of the United States, and would deprive the said defendants of their property without due process of law, and would deny to the defendants the equal protection of the laws, contrary to the Constitution of the United States, and especially to the Fourteenth Amendment thereof, which constitutional protection and immunities are hereby specially set up and claimed on behalf of said defendants."

2. For that the court erred in refusing to grant the motion of the defendants to quash the bill of indictment in this cause "Because said statute of the State of North Carolina, to-wit: Chapter 56
25 of the Public Laws of 1913, ratified the 6th day of March, 1913, is unconstitutional and void, in that the same does not bear equally upon all persons similarly situated; is arbitrary and unreasonable, and if enforced would deprive said defendants of their property without due process of law, and deny to them the equal protection of the law, contrary to the Constitution of the United States, and contrary to the Fourteenth Amendment thereof, the protection of which the said defendants hereby specially plead and invoke."

3. For that the court erred in holding and adjudging the de-

fendants guilty upon the special verdict as appears in the record: "Because the statute of the State of North Carolina, under which said bill of indictment purports to have been found and returned, to-wit: Chapter 56 of the Public Laws of North Carolina, passed by the General Assembly at its regular session in the year 1913 and ratified on the 6th day of March, 1913, is unconstitutional and void, in that the same, if enforced against these defendants, would abridge the privileges and immunities of the defendants, citizens of the United States, and would deprive the said defendants of their property without due process of law, and would deny to the defendants the equal protections of the laws, contrary to the Constitution of the United States, and especially to the Fourteenth Amendment thereof, which constitutional protection and immunities are hereby specially set up and claimed on behalf of said defendants.

2. Because said statute of the State of North Carolina, to-wit: Chapter 56 of the Public Laws of 1913, ratified the 6th day of March, 1913, is unconstitutional and void, in that the same does not bear equally upon all persons similarly situated; is arbitrary and unreasonable, and if enforced would deprive said defendants of their property without due process of law, and deny to them the
26 equal protection of the law, contrary to the Constitution of the United States, and contrary to the Fourteenth Amendment thereof, the protection of which the said defendants hereby specially plead and invoke."

MARTIN, ROLLINS & WRIGHT,
Attorneys for Defendants.

Filed April 20, 1917.

JOHN H. CATHEY,
Clerk Superior Court.

Clerk's Certificate.

STATE OF NORTH CAROLINA,
County of Buncombe:

In the Superior Court.

STATE

v.

FRED A. PERLEY and W. H. CROCKETT.

I, John H. Cathey, Clerk of the Superior Court of Buncombe County, do hereby certify that the foregoing is a true and perfect copy of the record in the above-entitled action.

Witness my hand and the seal of the Superior Court of Buncombe County, North Carolina, this the — day of April, A. D., 1917.

JOHN H. CATHEY,
Clerk of Superior Court for Buncombe County, North Carolina.

27 *Docket Entries.*

Appeal from the Superior Court of Buncombe by defendants docketed April 30, 1917. Case argued by counsel May 15, 1917. Opinoin of the Court delivered by Walker, J., May 23rd, 1917, as follows:

28 In the Supreme Court of North Carolina, February Term, 1917.

No. 530.

STATE

v.

FRED A. PERLEY and W. H. CROCKETT.

Buncombe County.

Indictment tried before Adams, J., and a jury, at April Term, 1917, of Buncombe Superior Court.

Defendants were indicted for a violation of Public Laws of 1913, Ch. 56, by cutting down timber on lands of another, and leaving thereon the tree tops, boughs, laps and other portions of timber not fit for commercial purposes, within four hundred feet of the boundary line of the watershed of the Asheville water works plant, owned by said city, and used as a public supply for its citizens. Defendants were duly notified more than three months before indictment found to remove the same, and failed and refused to do so. The requirement of the law was declared to be for the prevention of the spread of fire from the timber lands to the watershed, and its injury from the destruction of timber growing thereon. There was a motion to quash, which was overruled, and a special verdict. The defense was that the statute is contrary to the 14th amendment of the Constitution of the United States, as it deprives the defendants of their property without due process of law, and denies to them the equal protection of the law. There was no denial that the prohibited acts were com-

29 mitted, but the defendants alleged that the statute is void, and that they are, by the peculiar facts, exempt from its provisions. The special verdict found "that on July 1, 1916, the City of Asheville, a municipal corporation, did own a certain large boundary of land, situated in the County of Buncombe, and State of North Carolina, which said boundary of land consists of about 16,000 acres, the outside boundary of which is about 12 miles in length; that on the 1st day of July, 1916, prior thereto and since that time, the said City of Asheville, held and used said property as a water shed, from which it derived water which was furnished to the inhabitants of the City of Asheville, North Carolina, for domestic and other purposes, which said property was known as the City Water Shed. That the

defendants, Fred A. Perley and W. H. Crockett, on or about the 1st day of July, 1916, were the owners of standing and fallen timber on certain lands situated in Yancey County, North Carolina, which said lands lie within four hundred feet of said water shed belonging to the City of Asheville, and adjoining said water shed on the north about four miles, but did not own the land on which said timber stood and that water did not drain from said timber, or the land on which it stood, on to said water shed; that said water shed extends to the north to the top of ridges and mountains on one side, and the timber owned by the defendants, which was cut as herein found, stood on land extending to the south which reached the tops of the ridges and mountains on the opposite side, and that said lands and timber were in all respects substantially similar on both sides of the line of said city water shed, both within and without."

The Court, not agreeing with the defendants in their contention, the jury in submission of its opinion found the defendants guilty on the special verdict, and, from the judgment of the Court thereon, they appealed.

J. E. Swain; Marcus Erwin and J. S. Manning, Attorney-General and R. H. Sykes, Assistant Attorney-General for the State.

Martin, Rollins & Wright for Defendants.

WALKER, J., after stating the case:

The possession and enjoyment of all rights are subject to such reasonable conditions and regulations as may be deemed by the legislature essential to the public welfare, and especially are they held in subordination to the exercise of the police power which extends and relates to the preservation of the peace, good order, safety, health, morals, convenience and comfort of the people. It is not confined to the suppression of what is offensive, disorderly or unsanitary, but embraces those rules and regulations designed to promote the public good and general prosperity of the community, provided that the legislation of whatever kind has a real or substantial relation to those objects, and is not a palpable invasion of individual rights secured by the fundamental law. In its broadest sense, as sometimes defined, it includes nearly all legislation and almost every function of civil government. New York v. Miln, 11 Peters (U. S.) 102; Barbier v. Connelly, 113 U. S., 27; L. & N. R. R. v. Kentucky, 161 U. S., 677; Lockner v. New York, 198 U. S., 45; Lawton v. Steele, 152 U. S., 133; Hennington v. Georgia, 163 U. S., 299; Bacon v. Walker, 204 U. S., 311.

It is held that this power is not subject to any definite limitations, but is coextensive with the necessities of the case and the safeguards of public interest. Camfield v. U. S., 167 U. S., 518. The fourteenth amendment to the Federal Constitution does not restrict the subjects upon which the police power may be lawfully exerted. Jones v. Brim, 165 U. S., 180. In Lockner v. New York, supra, Justice Peckham said of it: "There are, however, certain powers, existing in the sovereignty of each state in the Union, somewhat vaguely termed police powers, the exact description and

limitation of which have not been attempted by the courts. Those powers, broadly stated, and without, at present, any attempt at a more specific limitation, relate to the safety, health, morals, and general welfare of the public. Both property and liberty are held on such reasonable conditions as may be imposed by the governing power of the state in the exercise of those powers, and with such conditions the 14th Amendment was not designed to interfere," citing Mugler v. Kansas, 123 U. S., 623, and other cases. The regulation of the use of land comes within the scope of the police power. Tiedeman on Limitations of Police Powers, Sec. 122, says at page 423: "It is not every use which comes within this constitutional protection. One has a vested right to only a reasonable use of one's lands. It is not difficult to find the rule which determines the limitations upon ways or manner of using lands. It is the rule, which furnishes the solution of every problem in the law of police powers, and which is comprehended in the legal maxim, sic utere tuo, ut alienum non laedas. One can lawfully make use of his property only in such a manner as that he will not injure another." We held in Durham v. Cotton Mill, 141 N. C., 615 (S. C. 144 N. C., 705); that the statute (Revisal, sec. 3051) for the protection
32 of streams from which the public is supplied with drinking water, was a valid exercise of this power, and that act required the riparian owner to subject sewage on his own land to a system of purification before discharging it into such a watercourse. We there said, at page 636: "The extent to which such interference with the injurious use of property may be carried is a matter exclusively for the judgment of the Legislature when not controlled by fundamental law. Nor is there anything to render such legislation objectionable because in some instances it may restrain the profitable use of private property, when such use in fact does not directly injure the public in comfort or health. For to limit such legislation to cases where actual injury has occurred would be to deprive it of its most effective force. Its design is preventive, and to be effective it must be able to restrain acts which tend to produce public injury. Many instances of such an exercise of this power can be found. The State regulates the use of property in intoxicating liquors by restraining their sale, not on the ground that each particular sale does injury, for then the sale would be prohibited, but for the reason that their unrestricted sale tends to injure the public morals and comfort. The State is not bound to wait until contagion is communicated from a hospital established in the heart of a city; it may prohibit the establishment of such a hospital there, because it is likely to spread contagion." The question has undergone discussion in Daniels v. Homer, 139 N. C., 219; State v. Railroad, 169 N. C., 295; Shelby v. Power Co., 155 N. C., 196; Skinner v. Thomas, 171 N. C., 98; and more recently in N. C. State Board of Health v. Commissioners of Louisburg, 91 S. E., 1019,
33 where it was held: "Even vested rights having reference to the ordinary incidents of ownership must yield to reasonable interference in the exercise of police power. In that field, as stated, the judgment of the Legislature is, to a great extent, decisive, and

must be unheld unless the statute in question has no reasonable relation to the end or purpose in view and is manifestly an arbitrary and palpable invasion of personal and private rights," citing numerous authorities. It is said in Russell on Police Powers of the State, page 95: "Regulations to prevent fires are within the scope of the police power, as has been frequently determined. The removal of buildings for the purpose of preventing the spread of fires is authorized. Related to this subject are laws prohibiting the keeping of explosive substances or highly inflammable substances within certain limits. The subject of building laws is also a related topic. Municipalities are very generally authorized to control the construction of buildings and to prevent the erection or maintenance of unsafe buildings. Such regulations are purely police regulations." We could multiply examples of the kind indefinitely, in illustration of the extent to which the courts have gone in sustaining legislation of the sort we are now considering, where private property has been controlled and regulated in its use for the protection of the public health and safety, and other things so essential to the common welfare. Every citizen derives his title to the property from the Sovereign, which with us is the State, and he acquires it upon the implied condition that it shall be held subject to all necessary or reasonable regulations in promotion of the public interest. Each citizen reaps an advantage, or substantial benefit, from the fact that all property is thus held, as the principle is a pro-
34 tection to his own as well as to that of others. It enhances its value, too, because his neighbor must so use his premises as not to injure him in the enjoyment of rights pertaining to his ownership of adjacent land. The rights, the duties, and the advantages, therefore, are all reciprocal. The enforcement of this law is a distinct benefit to all as much so, though not always in the same degree, as laws enacted for our personal safety and freedom from the annoyance of others. Private convenience must consequently give way to the public good in the interest of all, and in order that government may be administered, not for one, or even a few, but to benefit all who have equally a claim upon its protection. In Cusack v. City of Chicago, 37 Sup. Ct. Rep., 190, Justice Clarke said for the court: "The principles governing the exercise of the police power have received such frequent application and have been so elaborated upon in recent decisions of this court, concluding with Armour & Co. v. North Dakota, 240 U. S., 510, that further discussion of them would not be profitable, especially in a cast falling as clearly as this one does within their scope. We therefore content ourselves with saying that while this court has refrained from any attempt to define with precision the limits of the police power, yet its disposition is to favor the validity of laws relating to matters completely within the territory of the state enacting them, and it so reluctantly disagrees with the local legislative authority, primarily the judge of the public welfare, especially when its action is approved by the highest court of the state whose people are directly concerned, that it will interfere with the action of such authority only when it is plain and palpable that it has no real or substantial

relation to the public health, safety, morals, or to the general welfare," citing Jacobson v. Massachusetts, 197 U. S., 11. In
35 the case of L. S. & M. So. Railway Co. v. Clough, 37 Sup. Ct. Rep., 144, speaking of the application of this law to a drainage case, Justice Pitney said: "It is requiring them merely to bear the cost of constructing crossings for their railroad lines over the proposed new channel and outlet, 'so as not to interfere with the free use of the same,' and 'in a sufficient manner not to unnecessarily impair its usefulness.' With respect to this duty, if the state has a right to impose it in aid of the drainage project, the remoteness or proximity of the area to be drained is wholly immaterial." But the question we have here, upon the special facts of this case, seems to have been decided by that same high court, in Mo. & C. R. R. Co. v. May, 194 U. S., 267, upon facts, not materially dissimilar to those in this record, and the law was upheld notwithstanding that it was confined to railroads, and was apparently discriminative with respect to that particular class. The statute of Texas, which was considered in that case, provided that it should be unlawful for railroad company-s to permit Johnson grass, or Russian thistle, to mature and go to seed upon its right-of-way. The law was sustained as the act forbidden would, if committed, be injurious to owners of contiguous land, as the grass was a menace to crops, and is propagated only by seed. The court was divided in opinion, but all the Justices concurred that the law would clearly be valid if not discriminative in its restricted application to railroads, the majority holding that it was not even discriminative. In the opinion of the court, Justice Holmes well said: "Great constitutional provisions must be administered with caution. Some play must be allowed
36 for the joints of the machine, and it must be remembered that legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts." That case was affirmed at the present term of the court in Chicago etc. R. R. Co. v. Anderson, 37 Sup. Ct. Rep., 124, where it held a statute valid which provided that all railroad corporations in Indiana should "cause all thistles, briars, docks, and other noxious weeds, growing on lands occupied by them in any city, village or township of the State, to be cut down and destroyed"; and annexed a penalty for its violation. The court held that the statute was valid as applied in favor of contiguous landowners, stating that "as thus limited, we think, its validity must be admitted under the doctrine of the May case."

Applying these well settled principles to the facts of this case, we do not see why this statute is not a perfectly valid exercise of the State's police power. The object in view, when it was passed, appears so clearly to be the protection of the forests on the water shed belonging to the city and used by it in connection with its waterworks, that, what was the real intention of the act, is not the subject of argument. Where premises are in such condition and location, that the proper maintenance of forests on them, or wooded land, which is a part of them, will remove or diminish the danger of floods or landslides, the protection of the water basin, or other source

of supply, from such consequences is of such great importance to the public, who use the water for domestic purposes and are dependent solely upon it, and the loss and inconvenience from any impairment of it might be so incalcu-able, that it can hardly be conceived why the legislature may not intervene by an exercise of the police power and prevent such a catastrophe. The loss to be averted would
37 so considerably outweigh the injury resulting to the owner of contiguous lands, and it would be so negligible when compared with the public damage, that the restrictions impose- upon him, will be disregarded as too insignificant to be set off against the great public benefit, and pressing public necessity, involved in the continued and proper maintenance of the watershed. It is no hardship for the landowner to clear his land of rubbish which he has made himself, and which, when it becomes dry, is so combustible in its nature as to be a standing menace to the adjacent forests. We have held that it is negligent for a railroad company to permit such inflammable matter, as tree-tops, etc., to accumulate on its premises which, if ignited, will spread fire to adjoining premises. Craft v. Timber Co., 132 N. C., 152. We have also enforced the provisions of our statute, Revisal, sec. 3346, against setting fire to woods without due notice to adjoining proprietors. Such restrictions upon the use of property have frequently been sustained by the courts, one writer stating that the books are full of such cases. Many of our municipal ordinances depend for their validity upon the existence of this power to preserve and promote the safety and welfare of the community. Considering a county ordinance requiring each landowner to rid his premises of the pesky ground-squirrel, by their extermination, which was held to be invalid, because of the impossibility of executing it, the court said, in Ex Parte Hodges, 87 Calif., 162, 165: "Such an ordinance differs materially from laws requiring an occupant of land to keep them free from noxious weeds, or such as make it the duty of an owner of diseased domestic animals to kill them, in order to prevent the spread of the disease. There are matters over which
38 the property owner has control, and the requirements are reasonable and just." See also Fruend on Police Power, Sec. 618.

A nuisance at common law is whatever is injurious to a large class of the community, or annoys that portion of the public which necessarily comes in contact with it. Prentice on Police Powers, p. 137; 2 Wh. Cr. Law, sec. 2370. There are several different classifications of nuisances, one of which is this: "First, those which are nuisances per se, denounced as such by common law or statute; Second, those which in their nature are not nuisances but may become such by reason of locality or management; Third, those which in their nature may be nuisances but as to which there may be honest differences of opinion in impartial minds. As to the first and third the municipal declaration is conclusive, but as to the second the municipal power is confined to such as are nuisances in fact." Fruend on Police Power, p. 30. We can scarcely hesitate to declare that to a nuisance which threatens the main, if nit the only source of water supply to a thickly settled community, containing a large

and progressive city, which has attracted many to its borders in search of pleasure, health or prosperity, because of its many natural advantages, its Salubrious climate, the beautiful scenery of its surrounding mountains, from one of which it derives its water supply, and which are covered with virgin forests and porous soil, which hold in check the heavy rains, and protect the streams from sudden and violent disturbances. Recent experience has demonstrated the necessity of keeping these forests intact, and the National Government has purchased and established near there a large reservation partly for this purpose.

In the case before us, the defendant, perhaps, did not intend to injure any particular persons, or to expose them to harm, but
39 he was guilty of the criminal act in doing that which was prohibited, and which was calculated to produce injurious results, without regard to his particular intent. When a statute forbids a certain thing to be done, the intent to do the forbidden thing, is the criminal intent, whether it be an immoral, or evil one, per se, or not. Here the purpose of the law is to prevent the injury and the gist of the crime is the effort to frustrate this intent. It is as much the duty of the State to protect the health of its citizens, as it is to safeguard their lives and limbs against the acts of wrong-doers. Ethically considered, it is as culpable to endanger the safety and comfort of an entire community, as it is to jeopardize the life of one of its members against whom a particular wrongful act is directed, and concededly more so. It is not the bad motive present in the mind, and which prompts the commission of the injurious act, but the doing of the act itself, that makes it indictable under the statute. Forest fires are not infrequent even in this section of the country, and they are caused generally by the dry and inflammable material lying upon the ground, and they spread with great rapidity and leave the destruction of vast areas in their wake. It was against the happening of such an event the statute was intended to provide. When such interests are involved as the safety and health of a large community, we cannot stop to speculate upon chances, or to take risks, as to what will happen, but we must keep on the safe side, so that if what would otherwise end in disaster does come, we will be prepared for it, and the public welfare will thereby be surely conserved. Durham v. Cotton Mill, supra; Bd. of Health v. Louisburg, supra.

40 When a statute is assailed as unconstitutional, every presumption of validity should be indulged in its favor, and it should not be declared void except upon the clearest showing that it conflicts with the organic law. The conclusion that it is invalid should be unavoidable, and reached only after removing every reasonable doubt as to its incompatibility with the constitution. Between the two there should be an irreconcilable conflict. Therefore it is, that the highest Federal Court said: "In the exercising of the police power, the means to be employed to promote the public safety are primarily in the judgment of the Legislature, and the courts will not interfere with duly enacted legislation which has a substantial relation to the purpose to be accomplished, and does not arbitrarily interfere with personal and private rights." It was

said in Thomas v. Skinner, supra: "The police power is an attribute of sovereignty, possessed by every sovereign State, and is a necessary attribute of every civilized government. 'It is the power to protect the public health and the public safety, to preserve good order and the public morals, to protect the lives and property of the citizens, the power to govern men and things by any legislation appropriate to that end.' 'Upon it depends the security of social order, the life and health of the citizen, the comfort of an existence in a thickly populated community, the enjoyment of private and social life, and the beneficial use of property.' The exercise of this power is left largely to the discretion of the law-making body, and the authority of the courts cannot be invoked unless there is an unnecessary interference with the rights of the citizen, or when there is no reasonable relation between the statute enacted and the end or purpose sought to be accomplished," citing 6 Rul. Case L., 183; and 236; 9 Ency. of U. S. Reports, 473; Slaughterhouse cases,
41 16 Wall., 36, 21 L. Ed., 394. It may be true that, let a statute be ever so charitable and the legislature ever so generous, if the property of the subject is thus given away, or it is taken without any resultant benefit to the public, the legislation should not be countenanced, but such is not the case here. The defendant is not the owner of the soil, but had only some logging rights in the timber growing upon it. When he cut and removed the timber, it was a comparatively easy matter for him to carry off the tree tops and other debris, or, at most, no great burden or hardship, and his failing to do so created a constant menace to the local public. If there is any reasonable doubt of it, that doubt should be resolved in favor of the latter, and against him.

The question is a very important one, and we have given to it most careful consideration. It was argued before us by Mr. Martin, with his usual ability and learning, which means that the case has been presented for the defendant most strongly from its every angle, but, after all he has said, we have not discovered any error in the record.

No error.

42 Supreme Court of North Carolina, February Term, 1917.

No. 530.

STATE

v.

FRED A. PERLEY and W. H. CROCKETT.

Buncombe County.

This cause came on to be argued upon the transcript of the record from the Superior Court Buncombe County: Upon consideration whereof, this Court is of opinion that there is no error in the record and proceedings of said Superior Court.

It is therefore considered and adjudged by the Court here, that the opinion of the Court, as delivered by the Honorable P. D. Walker, Justice, be certified to the said Superior Court, to the intent that the judgment be affirmed.

And it is considered and adjudged further, that the defendants and surety, C. A. Dickey, do pay the costs of the appeal in this Court incurred, to wit, the sum of Forty-six 30/100 dollars ($46.30), and execution issue therefor.

43 Supreme Court of North Carolina.

I, J. L. Seawell, Clerk of the Supreme Court of North Carolina, do hereby certify the foregoing to be a full, true and correct transcript of the case lately pending in this Court entitled "State v. Fred A. Perley and W. H. Crockett."

Witness my hand and seal of said Court at office in Raleigh this the tenth day of August 1917.

[Seal of the Supreme Court of the State of North Carolina.]

J. L. SEAWELL,
Clerk of the Supreme Court of North Carolina.

Endorsed on cover: File No. 26,101. North Carolina Supreme Court. Term No. 634. Fred A. Perley and W. H. Crockett, plaintiffs in error, vs. The State of North Carolina. Filed August 20th, 1917. File No. 26,101.

FILED
MAR 4 1918
JAMES D. MAHER

Supreme Court of the United States.

OCTOBER TERM, 1917.

No. 251

FRED A. PERLEY AND W. H. CROCKETT, PLAINTIFFS IN ERROR,

v.

THE STATE OF NORTH CAROLINA.

BRIEF OF

MARTIN, ROLLINS & WRIGHT,
Counsel for Plaintiffs in Error.

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Supreme Court of the United States.

OCTOBER TERM, 1917.

No. 634

FRED A. PERLEY AND W. H. CROCKETT, PLAINTIFFS IN ERROR,

v.

THE STATE OF NORTH CAROLINA.

BRIEF OF

MARTIN, ROLLINS & WRIGHT,

Counsel for Plaintiffs in Error.

STATEMENT OF CASE.

This is a criminal action, begun by indictment in the Superior Court of Buncombe County, North Carolina. The Plaintiffs in Error were convicted of an offense under a statute of North Carolina, reading as follows:

"Section 1. That any person, firm or corporation owning lands, or the standing timber on lands within four hundred feet of any watershed held or owned by any city or town, for the purpose of furnishing a city or town water supply, upon cutting or removing the timber, or permitting same cut or removed, from lands so within said four hundred feet of said watershed, or any part thereof, shall, within three months after cutting or earlier upon written notice by said city or town, remove or cause to be burned under proper supervision all tree-tops, boughs, laps and other portions of timber not desired to be taken for commercial or other purposes, within four hundred feet of the boundary line of such part of said watershed as is held by such town or city, so as to leave such space of four hundred feet immediately adjoining

the boundary lines of such watershed so held or owned, free and clear of all such tree-tops, laps, boughs and other inflammable material caused by or left from cutting such standing timber, so as to prevent the spread of fire from such cut-over area, and the consequent damage to such watershed.

"Section 2. That any such person, firm or corporation violating the provisions of this act shall be guilty of a misdemeanor."

Under this Statute, Plaintiffs in Error were indicted for failure to remove certain tree-tops, boughs, laps and other portions of timber not desired to be taken for commercial purposes, situated on lands belonging to the Plaintiffs in Error but within four hundred feet of the line of lands belonging to the City of Asheville, a municipal corporation under the laws of North Carolina, which last mentioned lands were used by the City of Asheville as a watershed from which water was obtained for sale to the inhabitants of the town and for other purposes. (Record, page 8). Plaintiffs in Error filed a motion to quash the bill of indictment because the Statute under which they were indicted was unconstitutional and void and violative of the Constitution of the United States, and particularly of the Fifth and Fourteenth Amendments thereto. (Record, pages 9 and 10).

In the trial court at April Term, 1917, (Record page 10), the jurors rendered a special verdict reading as follows:

"The jurors find that on the 1st day of July, in the year of our Lord one thousand nine hundred and sixteen, the City of Asheville, a municipal corporation, did own a certain large boundary of land, situated in the County of Buncombe, and State of North Carolina, which said boundary of land consists of about 16,000 acres, the outside boundary of which is about 12 miles in length; that on the 1st day of July, 1916, prior thereto and since that time, the said City of Asheville, held and used said property as a watershed, from which it derived water which was furnished to the inhabitants of the City of Asheville, North

Carolina, for domestic and other purposes, which said property was known as the City Water Shed.

"That the defendants, Fred A. Perley and W. H. Crockett, on or about the first day of July, 1916, were the owners of standing and fallen timber on certain lands situated in Yancey County, North Carolina, which said lands lie within four hundred feet of said water shed belonging to the City of Asheville, and adjoining said watershed on the north about four miles, but did not own the land on which said timber stood and that water did not drain from said timber, or the land on which it stood, on to said water shed; that said water shed extends to the north to the top of ridges and mountains on one side, and the timber owned by the defendants, which was cut as herein found, stood on land extending to the south which reached the tops of the ridges and mountains on the opposite side, and that said lands and timber were in all respects substantially similar on both sides of the line of said city watershed both within and without. That on or about the 1st day of July, 1916, the said defendants, Perley & Crockett, did cut and remove a portion of the timber owned by them, standing and growing on said lands, adjoining the said watershed, and within four hundred feet of the line of the lands of the City of Asheville, hereinbefore referred to, and that said cutting and removing of said timber was done more than three months prior to the bringing of this indictment; that after the cutting and removing of said timber by the said defendants, and before the bringing of this action, the said City of Asheville gave due notice in writing to the defendants, commanding and warning them to remove, or cause to be burned, all tree-tops, boughs and laps, and other boughs and timber not desired to be taken for commercial purposes within 400 feet of the boundary line of said land so held by the City of Asheville; that after cutting and removing said timber from said lands, the said defendants had left on a portion of said lands and within four hundred feet of the line of the lands belonging to the City of Asheville, certain tree tops, boughs, laps and other portions of timber not desired to be taken for commercial

purposes or other purposes; that within said three months, and after notice as aforesaid, the said defendants failed, refused and neglected to remove or cause to be burned, all tree-tops, boughs and laps and other portions of timber not desired to be taken for commercial purposes, and within four hundred feet of the boundary line of the property of said City of Asheville, and did fail to leave a space of four hundred feet immediately adjoining said boundary line of said City of Asheville, free and clear of all such tree-tops, laps and boughs, caused or left from cutting such standing timber. And if, on the foregoing facts, the Court is of the opinion that the defendants are guilty, as a matter of law, then the jurors so find them guilty; if, on the foregoing facts, the Court is of the opinion that the defendants are not guilty, as a matter of law, then the jurors find the defendants not guilty."

Upon this special verdict the Defendants in Error were adjudged guilty of the misdemeanor and each fined the sum of Three Hundred Dollars and costs. (Record, page 12). The plaintiffs in error excepted to the refusal of the Court to quash the bill of indictment and also excepted to the judgment of guilt and appealed to the Supreme Court of North Carolina. (Record, page 12). At the February Term, 1917, of the Supreme Court of North Carolina, the judgment of the Superior Court of the County of Buncombe, State of North Carolina, was affirmed. (Record, pages 21 and 22).

The opinion of the Supreme Court of North Carolina is set out in full in the record. (Pages 14 to 21).

ASSIGNMENTS OF ERROR.

Plaintiffs in Error thereupon sued out this writ of error and assigned error as follows:

I.

For that the Court erred in refusing to grant the motion of the plaintiffs in error to quash the bill of indictment in this case, "Because the statute of the State of North Carolina under which said bill of indictment purports to have been found and returned, to wit, Chapter

56 of the Public Laws of North Carolina, passed by the General Assembly at its regular session in the year 1913, is unconstitutional and void, in that the same if enforced against these plaintiffs in error would abridge the privileges and immunities of the plaintiffs in error, citizens of the United States, and would deprive the said plaintiffs in error of their property without due process of law, and would deny to the plaintiffs in error the equal protection of the laws, contrary to the Constitution of the United States, and especially to the Fourteenth Amendment thereof, which constitutional protection and immunities are hereby specially set up and claimed on behalf of the plaintiffs in error."

II.

For that the Court erred in refusing to grant the motion of the plaintiffs in error to quash the bill of indictment in this cause "Because said statute of the State of North Carolina, to wit, Chapter 56 of the Public Laws of 1913, ratified the 6th day of March, 1913, is unconstitutional and void, in that the same does not bear equally upon all persons similarly situated; is arbitrary and unreasonable, and if enforced would deprive said plaintiffs in error of their property without due process of law, contrary to the Constitution of the United States, and contrary to the Fourteenth Amendment thereof, the protection of which the said plaintiffs in error hereby specially plead and invoke."

III.

For that the Court erred in holding and adjudging the plaintiffs in error guilty upon the special verdict as appears in the record "Because the statute of the State of North Carolina under which said bill of indictment purports to have been found and returned, to wit: Chapter 56 of the Public Laws of North Carolina, passed by the General Assembly at its regular session in the year 1913, and ratified on the 6th day of March, 1913, is unconstitutional and void, in that the same if enforced against the plaintiffs in error, would abridge the privileges and immunities of the plaintiffs in error, citizens of the United

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IV.

Because said statute of the State of North Carolina, to wit, Chapter 56 of the Public Laws of 1913, ratified the 6th day of March, 1913, is unconstitutional and void, in that the same does not bear equally upon all persons similarly situated; is arbitrary and unreasonable, and if enforced would deprive said plaintiffs in error of their property without due process of law, and deny to them the equal protection of the law, contrary to the Fourteenth Amendment thereof, the protection of which the said plaintiffs in error hereby specially plead and invoke.

ARGUMENT.

I.

Plaintiffs in Error insist that the statute under which they have been convicted and fined is unconstitutional and void because the same is arbitrary and unreasonable and the discrimination attempted to be made by the same has no reasonable relation to the object sought to be accomplished.

Yick Wo v. Hopkins, 118 U. S., 356.

We insist that this statute is void for the following specific reasons:

(1) Because tree-tops, boughs, laps and other portions of timber not desired to be taken for commercial purposes lying on the land of the owner thereof and four hundred feet and less from the line of land of the City of Asheville, constituting the watershed of said City, are absolutely harmless; they contain no element of injury

or damage to anyone and could not by any possibility be construed into a nuisance.

"The exercise of this power (police power) does not extend to the destruction of property, under the form of regulating the use of it, unless in cases where the property, or the use of it, constitutes a nuisance."

State v. Yopp, 97 N. C., 477, 482.

In Yopp's case, the doctrine of the police power and the right of the State regulate the use of private property is discussed at length, and the above quoted principle is laid down as the basis of the decision of the Court.

In reason and common sense, and according to all the decisions of the Courts, where the act prohibited is not in itself, a nuisance or injurious to another, or likely so to be, it cannot be made unlawful by statute.

Evansville v. Miller, 146 Ind., 613, 38 L. R. A., 161-174;
Harmison v. Lewiston, 46 see app. 164, 165;
Re Sam Kee, 31 Fed., 680;
Yates v. Milwaukee, 10 Wall., 497, 505;
State v. Matt, 61 Md., 297, 48 Am. Rep. 105-107;
Ex Parte Whitwell, 98 Cal., 73, 83; 19 L. R. A., 727.

"A certain use of lands, harmless in itself, does not become a nuisance, because the legislature has declared it to be so." Tiedeman Police Power 122-A.

The police power can be resorted to for the purpose of preserving the public life, safety or morals, but it cannot be put forward as an excuse for oppressive and unjust legislation.

State v. Broadbelt, 89 Md., 565; 43 Atlantic, 771;
Booth v. People, 186 Ill., 43; 57 N. E., 789;
Harbison v. Knoxville Iron Co., 103 Tenn., 421; 53 S. W., 955.

It is said in Iler v. Ross, 64 Neb., 710; 90 N. W., 869, that the test of police regulations when they are called in question is whether they have some relation to the public

health or welfare, and whether such is in fact the end sought to be attained.

In the case of Booth v. People, *supra*, as reported in Am. St. Rep., Vol. 78, page 229, will be found an extensive note on the subject as to what Acts the Legislature may or may not declare a criminal. It may be stated that all of the cases are grounded on the principle that the exercise of police power is limited by the requirement that it must not arbitrarily and unreasonably affect the citizen in his life, liberty and property.

Ford v. State, 85 Fed. 465; 60 Am. St. Rep. 337;
State v. Moore, 104 N. C., 714;
See also State v. Briggs, 133 N. C., page 729.

In the last case, quoting from Lawton v. Steel, 152 U. S., pages 137, 138, the Court said, "The legislature may not under the guise of protecting public interests arbitrarily interfere with the private business or impose unusual or unnecessary restrictions upon lawful occupations." And it is further said in substance that statutes which declare acts or occupations harmless in themselves, to be criminal, are invalid.

In the case of Lawton v. Steele, 152 U. S., 133, 137, this Court discussing this doctrine, says:

"To justify the State in thus interposing its authority in behalf of the public it must appear first, that the interests of the public generally as distinguished from those of a particular class, require such interference and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals. The Legislature may not, under the guise of protecting the public interests, arbitrarily interfere with private business or impose unusual and unnecessary restrictions upon lawful occupations. In other words, its determination as to what is a proper exercise of its police powers is not final or conclusive, but is subject to the supervision of the courts; thus an act requiring the master of a vessel arriving from a foreign port to report the names, birth place and occupation of every passenger and the owner of such vessel to give a

bond for every passenger so reported, conditioned to indemnify the State against any expense for the support of the persons named for four years thereafter was held by this court to be indefensible as an exercise of the police power and to be void as interfering with the right of Congress to regulate commerce with foreign nations. Henderson v. N. Y., 92 U. S., 259. A similar statute of California requiring a bond for certain classes of passengers described, among which were "Lewd and debauched women" was also held to show very clearly that the purpose was to extort money from a large class of passengers or to prevent their immigration to California altogether, and was held to invade the right of Congress. Chy Lung v. Freeman, 92 U. S., 275. So in Railroad Co. v. Hysen, 95 U. S., 465, a statute of Missouri which prohibited the driving of Texas, Mexican, or Indian cattle into the State between certain dates in each year, was held to be in conflict with the commerce clause of the Constitution and not a legitimate exercise of the police powers of the State, though it was admitted that the State might for its self-protection prevent persons or animals having contagious disease from entering its territory. In Rockwell v. Nearing, 35 N. Y., 302, an act of the legislature of New York, which authorized the seizure and sale without judicial process of all animals found trespassing within private enclosures, was held to be obnoxious to the constitutional provision that no person could be deprived of his property without due process of law. See also Austin v. Murray, 16 Pic. 121; Watertown v. Mayo, 109 Mass., 315; the Slaughter-house cases, 16 Wall., 36; in re Cheesborough, 78 N. Y., 232; Brown v. Perkins, 12 Gray 89. In all these cases the acts were held to be invalid as involving an unnecessary invasion of the rights of property and a practical inhibition of certain occupations harmless in themselves, and which might be carried on without detriment to the public interests."

"It is true that under the Fourteenth Amendment, no State can deprive a person of his life, liberty, or property, without due process of law; but in determining what is due process of law we are bound to consider the nature of the property, the necessity for its sacrifice and the ex-

tent to which it has heretofore been regarded as within the police power. *So far as property is inoffensive or harmless, it can only be condemned or destroyed by legal proceedings with due notice to the owner;* but so far as it is dangerous to the safety or health to the community, due process of law may authorize its summary destruction."—Sentell v. New Orleans, etc., Rd. Co., 166 U. S., 705.

(2) Because municipalities in North Carolina which own watersheds could protect the same from any danger arising on account of the spread of fires by cleaning out a fire line on their own property.

To require a property owner who has lands adjoining a municipal watershed to clean up his own lands after he has cut timber therefrom in order to protect the property of a city or town which is engaged in the furnishing of water to its inhabitants, is to deprive such property holder of his property without due process of law and without just compensation. Under this statute, a municipality in North Carolina could cut down trees and leave brush, limbs, tree-tops and all other combustible matter on its own property and immediately adjoining the property of persons situated as the Plaintiffs in Error, without any violation of law and without being amenable to any remedy of any kind, and while this condition might exist, if the Plaintiffs in Error, or persons situated as they are, should cut a tree on their lands and fail to remove the brush, limbs and tree-tops, they would be guilty of a crime, so, as it seems to us, the statute discriminates unlawfully in behalf of municipalities, and in an unlawful and unreasonable and unconstitutional manner condemns acts committed by other individuals when if like and similar acts be done by the municipalities there is no violation of the statute.

This Court, in the case of Yick Wo v. Hopkins, 118 U. S., 356, 369, said: "The equal protection of the laws is a pledge of the protection of equal laws."

Measured by the above rule, can it be said that the plaintiffs in error have the protection of equal laws? Certainly not.

(3) The statute is arbitrary, partial, and unconstitutional in that it does not bear equally upon all. The statute does not pretend to protect the property of plaintiffs in error, or other persons in like situation, from the the acts of municipalities similar to those condemned, if committed, by persons in the situation of plaintiffs in error. If a municipality should cut and remove timber from its own lands constituting its watershed, it could leave the tree-tops, boughs, laps, and other portions of timber not desired to be taken for commercial purposes, within four hundred feet of the boundary line of such water shed and thus expose the timber and lands of the plaintiffs in error, or other persons similarly situated, to damage by fire originating on the lands of the municipality with perfect impunity; whereas, if the same acts be done by the plaintiffs in error they are held to be criminals. There must be and is a limit to the exercise of the police power by a state. In the case of Lockner v. N. Y., 198 U. S., 45, 56, this Court well said:

"It must, of course, be conceded that there is a limit to the valid exercise of the police power by the State. There is no dispute concerning this general proposition. Otherwise the Fourteenth Amendment would have no efficacy and the legislatures of the States would have unbounded power, and it would be enough to say that any piece of legislation was enacted to conserve the morals, the health or the safety of the people; such legislation would be valid, no matter how absolutely without foundation the claim might be. The claim of the police power would be a mere pretext—become another and delusive name for the supreme sovereignty of the State to be exercised free from constitutional restraint. This is not contended for. In every case that comes before this court, therefore, where legislation of this character is concerned and where the protection of the Federal Constitution is sought, the question necessarily arises: "Is this a fair, reasonable and appropriate exercise of the police power of the State, or is it an unreasonable, unnecessary and arbitrary interference with the right of the individual to his personal liberty or to enter into those

contracts in relation to labor which may seem to him appropriate or necessary for the support of himself and his family?"

In the case of Dobbins v. Los Angeles, 195 U. S., 223, 237, this Court said:

"And in Connolly v. Union Sewer Pipe Co., 184 U. S., 540, 558, Mr. Justice Harlan, delivering the opinion of the court, said: 'The question of constitutional law to which we have referred (the equal protection of the laws) cannot be disposed of by saying that the statute in question may be referred to what are called the police powers of the State, which, as often stated by this court, were not included in the grants of power to the General Government, and therefore reserved to the States when the Constitution was ordained. But as the Constitution of the United States is the supreme law of the land, anything in the Constitution or statutes of the States to the contrary notwithstanding, a statute of a State, even when avowedly enacted in the exercise of its police powers, must yield to that law. No right granted or secured by the Constitution of the United States can be impaired or destroyed by a state enactment, whatever may be the source from which the power to pass such enactment may have been derived.' 'The nullity of any act inconsistent with the Constitution is produced by the declaration that the Constitution is the supreme law.' The State has undoubtedly the power, by appropriate legislation, to protect the public morals, the public health and the public safety, but if, by their necessary operation, its regulations looking to either of those ends amount to a denial to persons within its jurisdiction of the equal protection of the laws, they must be deemed unconstitutional and void. Gibbons v. Ogden, 9 Wheat. 1, 210; Sinnot v. Davenport, 22 How. 227, 243; Missouri, Kansas & Texas Ry. v. Haber, 169 U. S., 613, 626'." * * * * "But, running current with this principle, and to be read with it, is one of equal importance, namely, that when the police power is exerted to regulate a useful business or occupation, the legislature is not the exclusive judge as to what is a reasonable and just restraint upon the constitutional right of the

citizen to pursue any trade, business or vocation, which in itself is recognized as innocent and useful to the community. It is always a judicial question if any particular regulation of such right is a valid exercise of police power, though the power of the courts to declare such regulation invalid will be exercised with the utmost caution, and only where it is clear that the ordinance or law declared void passes the limits of the police powers, and infringes upon rights guaranteed by the constitution."

The statute of North Carolina now under discussion is unconstitutional and void, because of its discriminatory character. The City of Asheville at the time this alleged cause of action arose, was engaged in the business of furnishing water to the inhabitants of the city for domestic and other purposes. This business was in the exercise of a governmental function and for that reason the City of Asheville, under the laws of North Carolina, held this property in substantially the same manner and under substantially the same conditions as if it had been a private individual. In the recent case of Howland v. City of Asheville, decided by the Supreme Court of N. C., 94 S. E., p. 524, which was an action against the City to recover damages for failure to furnish sufficient water to maintain an effective fire department, the City was held not liable because it was held to be exercising a governmental function in maintaining a fire department, but it has been often held in North Carolina, that where the city or town is not exercising a governmental function, it is liable for its acts as a private property holder. In the case above referred to, the Chief Justice in a concurring opinion, says:

"I understand this opinion and Harrington v. Greenville, 159 N. C. 632, 75 S. E. 849, to affirm the non-liability of a municipality in exercising the governmental function of maintaining a fire department, but that these cases do not apply where a city or town is maintaining a system of municipal waterworks. In such case, the liability of the municipality to employees, to the public, to patrons, and to any others is the same as a privately owned water company, for the reason that the municipality is then

operating a business enterprise and not governmentally."

In the case of Harrington v. Wadesboro, 153 N. C., 437, it was held by the Supreme Court of North Carolina, and many previous cases cited, that when a town or city was carrying on the business of supplying electricity it was not exercising a governmental function. Under such conditions, we insist that the statute in question in this case is void.

See Fisher v. Newbern, 140 N. C., 510;
Fisher v. Water Co., 128 N. C., 375.

This Court, in the case of Gulf, Colo. and Sante Fe Railway Co., v. Ellis, 165 U. S., 150, reviewed a large number of cases in which such a statute as that here under discussion was passed upon. The Court quotes from many of these decisions and concludes the opinion by saying, (page 165): "It is apparent that the mere fact of classification is not sufficient to relieve a statute from the reach of the equality clause of the Fourteenth Amendment, and that in all cases it must appear not only that a classification has been made, but also that it is one based upon some reasonable ground—some difference which bears a just and proper relation to the attempted classification—and is not a mere arbitrary selection."

The Supreme Court of North Carolina in its opinion in this case now in review, cites and relies upon as decisive of this controversy, the case of M. K. and T. R. R. Co. v. May, 194 U. S., 267 (see record, page 18). We most respectfully submit that the May case should not be and is not an authority decisive of this case. In the May case, it is expressly stated by the Court (page 269), "that Johnson grass is a menace to crops. That it is propagated only by seed and that a general regulation of it for the protection of farming would be valid." Here is where the distinction of the cases arises. Johnson grass is a menace to crops and is propagated by the seed only; therefore a statute making it a penal offense for a railroad company to allow Johnson grass to mature and go to seed upon its right of way was valid. That is true because by natural means and without the interference of any other agency the seed would become scattered over

the adjoining farming lands. Such is not true of "laps, boughs, and limbs of trees." Laps, boughs, and limbs of trees are in themselves absolutely harmless. Spontaneous combustion among them when lying out in the open woods is unknown. If the statute had made it a criminal offense to put out fire within a certain distance of the municipal watershed, then we would have had a case somewhat on all-fours with the May case, and such legislation could in all probability, if made general in its nature, be sustained; but that is not the effect of the statute under discussion here. Plaintiffs in error are not indicted under a statute which makes it an offense for them to do something which creates an actual danger to a municipal watershed. They are indicted under a statute which makes it an offense for them to leave combustible matter on their own lands, when in such combustible material itself there is absolutely no danger and no harm. Under this statute if a farmer owns woodland adjoining a municipal watershed in North Carolina, and he sees fit to cut for timber purposes, firewood purposes, or for any other purpose, any trees, standing on his lands and within four hundred feet of the line of the lands of a municipal watershed, he becomes a criminal unless within a time specified by the statute he removes all the boughs, laps, and limbs and other portions of such trees not desired to be taken for commercial or other purposes. Such a statute certainly, as it seems to us, is unconstitutional and void.

If the statute had been limited to lumbering operations and had applied only to persons engaged in the business of lumbering, there might have been more reason to sustain it, but it will be noted that this statute is broad and covers all classes of owners of timber trees and therefore embraces all persons who own timber within four hundred feet of a city watershed and casts burdens on such persons which are unusual, heretofore unknown, discriminatory, and, as we insist, unconstitutional.

Asheville, N. C.

JULIUS C. MARTIN,
THOS. S. ROLLINS,
GEO. H. WRIGHT,
Cousel for Plaintiffs in Error.

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Supreme Court of the United States

OCTOBER TERM, 1917

No. 251

FRED A. PERLEY AND W. H. CROCKETT

PLAINTIFFS IN ERROR

V.

THE STATE OF NORTH CAROLINA

BRIEF OF THE STATE OF NORTH CAROLINA

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Supreme Court of the United States

OCTOBER TERM, 1917

No. 634

FRED A. PERLEY AND W. H. CROCKETT

PLAINTIFFS IN ERROR

V.

THE STATE OF NORTH CAROLINA

BRIEF OF THE STATE OF NORTH CAROLINA

STATEMENT OF CASE.

The General Assembly of North Carolina at its regular 1913 session, enacted the following statute, the same being known as Chapter 56 of the Public Laws of 1913:

> "Section 1. That any person, firm or corporation owning lands, or the standing timber on lands within four hundred feet of any watershed held or owned by any city or town, for the purpose of furnishing a city or town water supply, upon cutting or removing the timber, or permitting same cut or removed, from lands so within said four hundred feet of said watershed, or any part thereof, shall, within three months after cutting, or earlier upon written notice by said city or town, remove or cause to be burned under proper supervision, all tree-tops, boughs, laps and other portions of timber not desired to be taken for commercial or other purposes, within four hundred feet of the boundary line of such part of said watershed as is held or owned by such town or city, so as to leave such space of four hundred feet immediately adjoining the boundary

lines of such watershed so held or owned, free and clear of all such tree-tops, laps, boughs and other inflammable material caused by or left from cutting such standing timber, so as to prevent the spread of fire from such cut-over area, and the consequent damage of such watershed.

"Section 2. That any such person, firm or corporation violating the provisions of this act shall be guilty of a misdemeanor."

The plaintiffs in error herein, to wit, Fred A. Perley and W. H. Crockett were later indicted for a violation of this statute, the indictment charging that they were the owners of standing timber on lands within four hundred feet of the watershed of the city of Asheville, a municipal corporation of the State of North Carolina, and had cut and removed timber on certain lands within four hundred feet of the said watershed property, from which the City of Asheville secured its water supply, and had failed and refused to remove or cause to be removed or burned all tree-tops, boughs, and laps, and other portions of timber not desired to be taken for commercial or other purposes within four hundred feet of the boundary line of such watershed, so as to leave a boundary line of four hundred feet free and clear of such tree-tops, boughs, laps and other inflammable material, in order to prevent spread of fire and consequent damage to said watershed, after due notice in writing given to such defendants, as provided by the statute. (Record, page 8.)

Plaintiffs in error filed a motion to quash the bill of indictment because the statute under which they were indicted was unconstitutional and void and in violation of the Constitution of the United States, and particularly the fifth and fourteen amendments thereof. (Record, pages 9 and 10.)

Upon the trial of the case at the April, 1917, term of the Superior Court of Buncombe County, the jurors rendered the following special verdict:

"The jurors find that on the 1st day of July, in the year of our Lord one thousand nine hundred and sixteen, the city of Asheville, a municipal corporation, did own a certain large boundary of land, situated in the county of Buncombe, and State of North Carolina, which said boundary of land consists of about 16,000 acres, the outside boundary of which is about 12 miles in length; that on the 1st day of July, 1916, prior thereto, and since that time, the said City of Asheville held and used said property as a watershed, from which it derived water which was furnished to the inhabitants of the City of Asheville, North Carolina, for domestic and other purposes, which said property was known as the City Watershed.

"That the defendants, Fred A. Perley and W. H. Crockett, on or about the first day of July, 1916, were the owners of standing and fallen timber on certain lands situated in Yancey County, North Carolina, which said lands lie within four hundred feet of said watershed belonging to the City of Asheville, and adjoining said watershed on the north about four miles, but did not own the land on which said timber stood, and that water did not drain from said timber, or the land on which it stood, on to said watershed; that said watershed extends to the north to the top of ridges and mountains on one side, and the timber owned by the defendants, which was cut as herein found, stood on land extending to the south which reached the tops of the ridges and mountains on the opposite side, and that said lands and timber were in all respects substantially similar on both sides of the line of said city watershed both within and without; that on or about the 1st day of July, 1916, the said defendants, Perley & Crockett, did cut and remove a portion of the timber owned by them, standing and growing on said lands, adjoining the said watershed, and within four hundred feet of the line of the lands of the City of Asheville hereinbefore referred to, and that said cutting and removing of said timber was done more than three

months prior to the bringing of this indictment; that after the cutting and removing of said timber by the said defendants, and before the bringing of this action, the said City of Asheville gave due notice in writing to the defendants, commanding and warning them to remove, or cause to be burned, all tree-tops, boughs, and laps and other boughs and timber not desired to be taken for commercial purposes within 400 feet of the boundary line of said land so held by the City of Asheville; that after cutting and removing said timber from said lands, the said defendants had left on a portion of said lands and within four hundred feet of the line of the lands belonging to the City of Asheville, certain tree-tops, boughs, laps and other portions of timber not desired to be taken for commercial purposes or other purposes; that within said three months, and after notice as aforesaid, the said defendants failed, refused and neglected to remove or cause to be burned, all tree-tops, boughs and laps and other portions of timber not desired to be taken for commercial purposes, and within four hundred feet of the boundary line of the property of said City of Asheville, and did fail to leave a space of four hundred feet immediately adjoining said boundary line of said City of Asheville, free and clear of all such tree-tops, laps and boughs caused or left from cutting such standing timber. And if, on the foregoing facts, the Court is of the opinion that the defendants are guilty, as a matter of law, then the jurors so find them guilty; if, on the foregoing facts, the Court is of the opinion that the defendants are not guilty, as a matter of law, then the jurors find the defendants not guilty."

Upon this special verdict the plaintiffs in error were adjudged guilty and each fined three hundred dollars and the costs (Record, page 12). They excepted to the refusal of the Court to quash the bill of indictment, and also excepted to the judgment of guilty and appealed to the Supreme Court of North Carolina. (Record, page 12.) At the Spring Term of the

Supreme Court of North Carolina the judgment of the Superior Court of the county of Buncombe was affirmed. (Record, pages 21 and 22). The opinion of the Supreme Court of North Carolina is set out in the record (pages 14-21).

ASSIGNMENTS OF ERROR.

Thereupon the plaintiffs in error sued out this writ of error, assigning error as follows:

I.

"For that the Court erred in refusing to grant the motion of the plaintiffs in error to quash the bill of indictment in this case, 'Because the statute of the State of North Carolina under which said bill of indictment purports to have been found and returned, to wit, Chapter 56 of the Public Laws of North Carolina, passed by the General Assembly at its regular session in the year 1913, is unconstitutional and void, and that the same if enforced against these plaintiffs in error would abridge the privileges and immunities of the plaintiffs in error, citizens of the United States, and would deprive the said plaintiffs in error of their property without due process of law, and would deny to the plaintiffs in error the equal protection of the laws, contrary to the Constitution of the United States, and especially to the Fourteenth Amendment thereof, which constitutional protection and immunities are hereby specially set up and claimed on behalf of the plaintiffs in error.'

II.

"For that the Court erred in refusing to grant the motion of the plaintiffs in error to quash the bill of indictment in this cause, 'Because said statute of the State of North Carolina, to wit, Chapter 56 of the Public Laws of 1913, ratified the 6th day of March, 1913, is unconstitutional and void, in that the same does not bear equally upon all per-

sons similarly situated; is arbitrary and unreasonable, and if enforced would deprive said plaintiffs in error of their property without due process of law, contrary to the Constitution of the United States, and contrary to the Fourteenth amendment thereof, the protection of which the said plaintiffs in error hereby specially plead and invoke.'

III.

"For that the Court erred in holding and adjudging the plaintiffs in error guilty upon the special verdict as appears in the record, 'Because the statute of the State of North Carolina under which said bill of indictment purports to have been found and returned, to wit, Chapter 56 of the Public Laws of North Carolina, passed by the General Assembly at its regular session in the year 1913, and ratified on the 6th day of March, 1913, is unconstitutional and void, in that the same if enforced against the plaintiffs in error, would abridge the privileges and immunities of the plaintiffs in error, citizens of the United States, and would deprive the said plaintiffs in error of their property without due process of law, and would deny to the plaintiffs in error the equal protection of the laws, contrary to the Constitution of the United States, and especially to the Fourteenth Amendment thereof, which constitutional protection and immunities are hereby specially set up and claimed on behalf of said plaintiffs in error.'

IV.

"Because said statute of the State of North Carolina, to wit, Chapter 56 of the Public Laws of 1913, ratified the 6th day of March, 1913, is unconstitutional and void in that the same does not bear equally upon all persons similarly situated; is arbitrary and unreasonable, and if enforced would deprive said plaintiffs in error of their property without due process of law, and deny to them the equal

protection of the law, contrary to the Fourteenth Amendment thereof, the protection of which the said plaintiffs in error hereby specially plead and invoke."

ARGUMENT.

The argument in the brief of plaintiffs in error is based upon the following general contention, to wit:

> **"That the statute under which they have been convicted and fined is unconstitutional and void because the same is arbitrary and unreasonable, and the discrimination attempted to be made by the same has no reasonable relation to the object sought to be accomplished."**

The specific reasons assigned for this contention are:

> **(1) Because tree-tops, boughs, laps and other portions of timber not desired to be taken for commercial purposes lying on the land of the owner, within four hundred feet of the watershed of the city of Asheville, are harmless, contain no element of potential injury, and could not by any possibility be construed into a nuisance.**
>
> **(2) Because municipalities owning watersheds could protect the same from any danger arising on account of the spread of fires by cleaning out a fire line on their own property.**
>
> **(3) Because the statute is arbitrary, partial and unconstitutional in that it does not bear equally upon all.**

The entire question here relates to the validity of Chapter 56 of the Public Laws of North Carolina of 1913, quoted above. The purpose of the statute is to protect the watershed of the water used in the city of Asheville and other municipalities for drinking, for the domestic purposes, for manufacturing and for protection against fire. Asheville is a large, growing city, with many attractions for visitors, with much wealth and noted as a health resort. It would be hard to conceive of a subject more vital to the needs and to the very life of a people than the sources of its water. A reasonable regulation, therefore, which is directed toward the

protection of the watershed within which the life and happiness and prosperity of a large modern city are generally contained has uniformly been held to come within that power inherent in the Legislatures of the States to enact laws regulating health, sanitation, morals, crime, quarantine, water-powers, water-supply, food supply, and almost every activity that preserves human life and promotes civilization.

Unless the statute now under consideration can be shown to be arbitrary or not enacted in good faith, or that it has no substantial relation to the advancement of the public good, this Court will not, according to former decisions, substitute its judgment for that of the Legislature, which is presumed to know the local needs of its State and to act in good faith.

> Yick Wo v. Hopkins, 118 U. S., 356.
> Powell v. Pa., 127 U. S., 677.
> Booth v. Ill., 134 U. S., 425.
> Holden v. Hardy, 169 U. S., 366.
> Lake Shore v. Ohio, 173 U. S., 285.
> Health Dept. v. Trinity Church, 145 N. Y., 32.

> "The Legislature has broad powers to take measures necessary for preventing sickness and epidemics; . . . It may provide for drains and proper systems of drainage; for a water supply and protection of the same from pollution."
>
> Cyc., Vol. 8, page 868.
> See also Tiedeman, Police Powers, page 449.

The statute in question is, by its very terms, aimed at the protection of the water supply of municipalities from pollution and other dangers. It does not appear that it would be either an expensive, laborious or unreasonable process for the plaintiffs in error to clean up the waste left behind the timbercutters, and in view of the wholesome and necessary object sought to be accomplished, the regulation is altogether reasonable. It is a matter of general knowledge that the boughs, laps and general debris left by the timbercutters after the mountain sides are denuded of the forests, dry out quickly and are then frequent

sources from which fires are started which become mighty conflagrations against which man stands helpless until they have spent their fury. Against such dangers it is necessary to take every precaution.

The sphere of the police power of the States is thus stated in *Lawton v. Steele*, 152 U. S., 133:

> "It is universally conceded to include everything essential to the public safety, health, and morals, and to justify the destruction or abatement, by summary proceedings, of whatever may be regarded as a public nuisance. Under this power it has been held that the State may order the destruction of a house falling to decay or otherwise endangering the lives of passers-by; the demolition of such as are in the path of a conflagration; . . . the prohibition of wooden buildings in cities, etc. . . . Beyond this, however, the State may interfere wherever the public interests demand it, and in this particular a large discretion is necessarily vested in the Legislature to determine, not only what the interests of the public require, but what measures are necessary for the protection of such interests."

In *California Reduction Co. v. Sanitary Reduction Works*, 199 U. S., 306, we find the following statement:

> "The States possess, because they have never surrendered, the power—and therefore municipal bodies, under legislative sanction, may exercise the power—to prescribe such regulations as may be reasonably necessary and appropriate, for the protection of the public health and comfort."

The Fourteenth Amendment to the Constitution is not designed to limit or interfere with the exercise of the police power on the part of the States.

Barbier v. Connolly, 113 U. S., 31.
Jones v. Brim, 165 U. S., 180.
L'Hote v. New Orleans, 177 U. S., 387.
Cumnius v. Reading School District, 198 U. S., 469.

The following statements are taken from the opinion of Mr. Justice Walker in the case now before the Court, reported in 173 N. C., 783:

> "The possession and enjoyment of all rights are subject to such reasonable conditions and regulations as may be deemed by the legislature essential to the public welfare, and especially are they held in subordination to the exercise of the *police power* which extends and relates to the preservation of the peace, good order, safety, health, morals, convenience and comforts of the people. It is not confined to the suppression of what is offensive, disorderly or unsanitary, but embraces those rules and regulations designed to promote the public good and general prosperity of the community, provided that the legislation of whatever kind has a real or substantial relation to those objects, and is not a palpable invasion of individual rights secured by the fundamental law. In its broadest sense, as sometimes defined, it includes nearly all legislation and almost every function of civil government. *New York v. Milu*, 11 Peters (U. S.), 102; *Barbier v. Connelly*, 113 U. S., 27; *L. & N. R. R. v. Kentucky*, 161 U. S., 677; *Lochner v. New York*, 198 U. S., 45; *Lawton v. Steele*, 152 U. S., 133; *Henuington v. Georgia*, 163 U. S., 299; *Bacon v. Walker*, 204 U. S., 311."

In *Cusack v. City of Chicago*, 242 U. S., 526, Justice Clarke said for the Court:

> "The principles governing the exercise of the police power have received such frequent application and have been so elaborated upon in recent decisions of this Court, concluding with *Armour & Co. v. North Dakota*, 240 U. S., 510, that further discussion of them would not be profitable, especially in a case falling as clearly as this one does within their scope. We therefore content ourselves with saying that while this Court has refrained from any attempt to define with precision the limits of the police power, yet its

disposition is to favor the validity of laws relating to matters completely within the territory of the State enacting them, and it so reluctantly disagrees with the local legislative authority, primarily the judge of the public welfare, especially when its action is approved by the highest court of the State whose people are directly concerned, that it will interfere with the action of such authority only when it is plain and palpable that it has no real or substantial relation to the public health, safety, morals, or to be general welfare," citing *Jacobson v. Massachusetts*, 197 U. S., 11.

The case most analagous to the case now before this court is that of *Mo. & M. C. R. R. Co. v. May*, 194 U. S., 267, where, upon a statement of facts somewhat similar to those in this record, the law was upheld, even though it was confined to railroads, and was apparently discriminative with respect to that particular class.

The statute of Texas, which was considered in that case, provided that it should be unlawful for railroad companies to permit Johnson grass, or Russian thistle, to mature and go to seed upon its right of way. The law was sustained, as the act forbidden would, if committed, be injurious to owners of contiguous lands, as the grass was a menace to crops, and is propagated only by seed. The Court was divided in opinion, but all the Justices concurred that the law would clearly be valid if not discriminative in its restricted application to railroads, the majority holding that it was not even discriminative. In the opinion of the Court, Justice Holmes well said: "Great constitutional provisions must be administered with caution. Some play must be allowed for the joints of the machine, and it must be remembered that legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts." That case was affirmed at the present term of the court in *Chicago, etc., R. R. Co. v. Anderson*, 242 U. S., 283, where it held a statute valid which provided that all railroad corporations in Indiana should "cause all thistles, briars, docks, and

other noxious weeds, growing on lands occupied by them in any city, village or township of the State, to be cut down and destroyed"; and annexed a penalty for its violation. The Court held that the statute was valid as applied in favor of contiguous landowners, stating that "as thus limited, we think, its validity must be admitted under the doctrine of the May case."

In the opinion of the Supreme Court of North Carolina in the case now before the Court (173 N. C., 783), it is said:

> "When a statute is assailed as unconstitutional, every presumption of validity should be indulged in its favor, and it should not be declared void except upon the clearest showing that it conflicts with the organic law. The conclusion that it is invalid should be unavoidable, and reached only after removing every reasonable doubt as to its incompatibility with the Constitution. Between the two there should be an irreconciliable conflict. Therefore it is, that the highest Federal Court said: 'In the exercising of the police power, the means to be employed to promote the public safety are primarily in the judgment of the Legislature, and the courts will not interfere with duly enacted legislation which has a substantial relation to the purpose to be accomplished, and does not arbitrarily interfere with personal and private rights.'"

From *Skinner v. Thomas*, 171 N. C., 98, the following is quoted:

> "The police power is an attribute of sovereignty, possessed by every sovereign State, and is a necessary attribute of every civilized government. 'It is the power to protect the public health and the public safety, to preserve good order and the public morals, to protect the lives and property of the citizens, the power to govern men and things by any legislation appropriate to that end.' 'Upon it depends the security of social order, the life and health of the citizen, the comfort of an existence in a thickly populated com-

munity, the enjoyment of private and social life, and the beneficial use of property.' The exercise of this power is left largely to the discretion of the law-making body, and the authority of the courts cannot be invoked unless there is an unnecessary interference with the rights of the citizen, or when there is no reasonable relation between the statute enacted and the end or purpose sought to be accomplished," citing 6 Rul. Case L., 183, and 236; 9 Ency. of U. S. Reports, 473; Slaughterhouse cases, 16 Wall., 36, 21 L. Ed., 394.

The State of North Carolina, upon the foregoing, respectfully submits that Chapter 56 of its laws passed at the regular session of the General Assembly of North Carolina in the year 1913 is a valid and constitutional enactment, and that the judgment of the Supreme Court of North Carolina, holding the plaintiffs in error guilty of the violation of the said law should be sustained.

Respectfully submitted,

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